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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. 73-337

THE SEVEN-UP COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, LEWIS A. ENGMAN, PAUL RAND DIXON, MARY GARDNER JONES, DAVID S. DENNISON, JR., MAYO J. THOMPSON, ANDREW C. GOODHOPE, Administrative Law Judge, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, affirming dismissal of the Complaint herein.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, dated May 31, 1973, has not yet been officially

reported; it has been reported unofficially at 1973 Trade Cases ¶ 74,528. The opinion of the district court of September 12, 1972, is reported officially at 349 F.Supp. 551, and unofficially at 1972 Trade Cases ¶ 74,204. The opinions of both courts, as well as the opinions of the Federal Trade Commission and its Administrative Law Judge denying petitioner's motion to dismiss the Federal Trade Commission's Complaint for failure to join indispensable parties are reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The issue before this Court is whether, when the Federal Trade Commission has determined to conduct proceedings without the participation of persons whose substantial contract and property rights are sought to be destroyed in the proceeding and whose absence from the proceeding threatens parties thereto with inconsistent claims and multiple litigation, a district court may exercise jurisdiction to prevent the Commission from conducting such proceeding until it has joined the indispensable parties.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitutional provision involved here is the due process clause of the Fifth Amendment to the United States Constitution. District court jurisdiction is conferred by Sections 1331(a), 1337, 1361 and 1651 of the Judicial Code, 28 U.S.C. §§ 1331(a), 1337,

1361 and 1651, and Sections 10(c) and (e) of the Administrative Procedure Act, 5 U.S.C. §§ 704 and 706. Other relevant provisions are Section Five of the Federal Trade Commission Act, 15 U.S.C. § 45, and Rule 19 of the Federal Rules of Civil Procedure. These provisions are printed in Appendix E hereto.

STATEMENT OF THE CASE

1. Factual Background

The Seven-Up Company (hereinafter "Seven-Up") is the owner of "Seven-Up" and other trademarks used in connection with the sale of soft drink beverages and is engaged in the manufacture of extract used in the production of the Seven-Up family of soft drink beverages. Soft drink extracts manufactured by Seven-Up are sold to its bottlers, who have entered into franchise agreements with Seven-Up.

There are more than 400 bottlers franchised to bottle and sell Seven-Up trademarked soft drinks. These bottlers vary in size, although the majority of them are small, family businesses. Under the franchise agreements bottlers are made responsible for production and sale of the Seven-Up family of beverages within designated areas. The bottlers' responsibilities include production of the beverage, maintenance of quality control, regular service of the retail accounts in the area and adequate coverage of the marketing area. By reason of his making the necessary investment in plant and facilities and his carrying out his responsibilities, each bottler is awarded an exclusive franchise in his area. (19a)[1]

[1] The suffix "a" hereinafter refers to page numbers within the appendices to this petition, *infra*.

The cumulative investment of the Seven-Up bottlers amounts to hundreds of millions of dollars. (19a) The bottlers have made these sizeable investments on the expectation that under the franchise agreements they would not only be responsible for developing a certain territory and serving all the accounts therein but also that they would enjoy the benefits of whatever demand they developed in their territories. In reliance upon the franchise agreements, including the territorial provisions, hundreds of individuals have built successful local businesses and over the years have expended huge sums in plants, manufacturing facilities, and distribution systems. The small bottlers have built their businesses by developing and serving designated territories. In many cases they have obtained loans on the strength of the good will which they have established in their territory and on the expectation that their exclusive territorial right will continue. It is unquestioned, therefore, that the Seven-Up bottlers view the franchise agreements between them and plaintiff, including the territorial provisions, as valuable, and in many cases, essential assets of their business.

2. Proceedings in the Federal Trade Commission

On July 15, 1972, the Commission issued a complaint[2] charging that Seven-Up has restrained com-

[2] Similar proceedings were brought by the FTC against seven other soft drink franchise companies. Two of these, The Coca-Cola Company and PepsiCo, Inc., filed similar district court actions in the Northern District of Georgia and the Southern District of New York, respectively. Both complaints were dismissed. The Coca-Cola Company v. FTC, 342 F.Supp. 670; PepsiCo, Inc. v. FTC, 343 F.Supp. 396. These dismissals were affirmed, and petitions for certiorari have been filed in both cases. The Coca-Cola Company v. FTC, — F. 2d — (5th Cir. 1972), (1973 Trade Cases ¶ 74,360), pet. for cert. filed, May 8, 1973; PepsiCo, Inc. v. FTC, 472 F. 2d 179 (2d Cir. 1972), pet. for cert. filed April 19, 1973.

petition in the sale of soft drink beverages "by restricting its bottlers from selling outside of a designated geographic area." The proposed Order accompanying the Commission's complaint would prevent Seven-Up from entering into, or otherwise giving effect to, any agreements limiting the territories in which its bottlers may sell soft drink products. It would also bar Seven-Up from entering into any agreement which would prevent any bottler from moving his place of business into a locality already being served by an existing bottler.

The complaint named only Seven-Up as a respondent, and not its bottlers. In answering the complaint, Seven-Up objected to the Commission's failure to join the bottlers, pleading that nonjoinder of these parties who are needed for adjudication rendered the complaint fatally defective, and moved for dismissal. (19a) The Commission's trial counsel (hereinafter "complaint counsel") opposed Seven-Up's motion and contended that despite the bottlers' absence from the proceeding the bottlers would be bound by any order affecting the contracts. (19a)

The Administrative Law Judge denied Seven-Up's motion to dismiss the complaint for nonjoinder of indispensable parties. In his opinion he acknowledged the probable damaging effect upon the bottlers' interests that a rule striking down the territorial provisions would have:

> It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondent has with its bottlers may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts . . . . To that extent,

> therefore, the bottlers may be considered indispensable. (21a)

Nevertheless, the Administrative Law Judge denied the motion to dismiss on the grounds that joinder was not "feasible" for two reasons: (1) a "presumption" that "a substantial number" of the bottlers might not be in commerce and, consequently, not subject to the Commission's jurisdiction, and (2) that joinder of Seven-Up's 470 bottlers would make a trial unmanageable. (21a) Despite his concern over the manageability of a proceeding with petitioner's bottlers participating, the Administrative Law Judge indicated he would permit any bottlers to intervene, although no attempt was made to notify the bottlers of the complaint or of the opportunity of intervention afforded them.

Seven-Up appealed to the Commission from the Hearing Examiner's ruling. Without expressly dealing with the Administrative Law Judge's reasons for denying appellee's motion to dismiss, the Commission upheld his ruling on the grounds that, even though its ultimate order might undermine the contractual relationships between respondents and third parties, the Commission's proceedings may properly disregard third parties to any contract which might be held in contravention of one of the antitrust laws. (14a) The fact that the lawfulness of the contract provisions under the antitrust laws had as yet not been determined was not held to entitle third parties to a right to participate in the proceedings in which their contract rights might be invalidated.

> It is well established, therefore, that third parties to a contract the legality of which is being chal-

lenged under the antitrust laws need not be joined in a suit against the first party and are thus not considered indispensable parties. (15a)

A second reason asserted by petitioner for joining the bottlers in the proceeding was that petitioner is being threatened with the prospect of multiple, inconsistent claims against it. However, the Commission concluded that petitioner had no grounds for such a fear; in the event that the contract provisions were invalidated, the bottlers, as parties to unlawful agreements, would have no enforceable rights because "supervening illegality renders a contract unenforceable even if it was legal when entered into." (16a) The Commission's decision did not attempt to show why the bottlers could not have been joined in the proceeding or demonstrate any difficulties in accomplishing joinder which would justify non-joinder of the bottlers.

On July 31, 1972, complaint counsel proposed a novel and controversial form of relief, referred to as a "Metro Area Bottler Handicap," under which, according to complaint counsel, "the larger bottlers now doing business in the 200 largest metro areas . . . for 10 years are limited to selling in metro areas and forbidden to sell in non-metro areas which such large bottlers do not presently serve . . . Thus small bottlers located adjacent to a metro area would be freed to sell into that metro area without concern that the metro bottler can retaliate by selling into the small bottlers' territory." (Memorandum by Complaint Counsel in Support of Motion for Partial Summary Decision, July 31, 1972, p. 17.)

FTC complaint counsel's proposal, if adopted, not only would destroy contract rights upon which the

bottlers have relied for years without their presence in the proceedings but also would inevitably and unnecessarily provoke conflicting claims between franchise companies and bottlers and among bottlers themselves. The full range of contract rights which might be affected by complaint counsel's proposal is not presently known, and without the participation of the bottlers the scope of the conflicting claims cannot be anticipated.

3. Proceedings in the Federal Courts Below

On May 8, 1972, Seven-Up filed a complaint in the United States District Court for the Eastern District of Missouri, requesting declaratory judgment and injunctive relief. On September 12, 1972 District Court Judge Regen dismissed the complaint and in a terse opinion ruled that the district court lacked subject matter jurisdiction, referring to the district court holdings in *The Coca-Cola Company* v. *Federal Trade Commission,* 342 F.Supp. 670 (N.D. Ga. 1972); and *PepsiCo., Inc.* v. *Federal Trade Commission,* 343 F.Supp. 396 (S.D. N.Y. 1972). (6a)

On May 31, 1973,[3] without reaching the question whether the bottlers should have been joined in the FTC proceedings as indispensable parties, the Court of Appeals for the Eighth Circuit affirmed the district court ruling that it lacked subject matter jurisdiction. (2a)

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[3] Following appeal to the Eighth Circuit, Miles W. Kirkpatrick resigned as Chairman of the Commission and A. Everette MacIntyre resigned as a member of the Commission. Lewis A. Engman, since appointed as Chairman of the Commission, and Mayo J. Thompson, since appointed a member of the Commission, have been substituted as respondents in this Court. Supreme Court Rule 48(3).

REASONS FOR GRANTING THE WRIT

This petition raises an important question concerning the authority of federal courts to intervene to remedy fundamental defects in agency proceedings. The defect here concerned is one which would vitiate the administrative proceedings in their entirety, namely, failure to join indispensable parties. Neither of the courts below reached the question whether the soft drink bottlers, whose territorial franchises would be eliminated by a judgment upholding the FTC complaint, are indispensable parties in the Commission proceedings. The courts below simply ruled that the district court lacked jurisdiction even to consider this matter. This ruling was erroneous on settled principles, since the alleged flaw in the agency's proceeding was a fundamental one, the issue presented involved a purely legal determination and the Commission's decision was final as a practical matter. The courts below clearly should have found that exercise of the district court's jurisdiction was appropriate in the circumstances of this case.

The courts below took an unreasonably narrow view of when courts may appropriately intervene to remedy invalid agency action.[4] It is well established, of course, that there are circumstances in which federal courts may properly review the claims of parties aggrieved by agency action prior to the culmination of the agency proceedings or prior to the normal process of judicial review contemplated by the particular administrative

[4] The Eighth Circuit correctly recognized that "statutory provisions for review [by a court of appeals exclusively of cease and desist orders], however, have been held not to preclude district court review under all circumstances" (App. 4a), although it failed to properly inquire whether such circumstances exist here.

scheme. *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 (1919); *Leedom* v. *Kyne,* 358 U.S. 184 (1958); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), and *Gardner* v. *Toilet Goods Assn,* 387 U.S. 167 (1967); *Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535 (1954) (determining the merits of plaintiff's contention that the time for action against it had expired); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963) (holding that the National Labor Relations Act did not extend to the situation in controversy; *Deering Milliken, Inc.* v. *Johnston,* 295 F.2d 856, 861 (4th Cir. 1961); *Adler* v. *United States,* 136 F.Supp. 956, 957-958 (Ct. Cl. 1956). While this power is not to be exercised without sound reasons, the exercise of this power is not in derogation of the administrative process, and where, as in this case, the absent parties will be bound, and their contractual rights jeopardized, by the administrative proceedings, judicial intervention is required to remedy defects which would nullify the entire proceedings.

However, the Court of Appeals below failed to take account of this Court's frequent instruction that exercise of the federal courts' power to intervene in agency proceedings is to be flexibly applied. Thus,

> ... the contention that the rigors of the exhaustion doctrine should be relaxed is not to be met by mechanical recitation of the broad interests usually served by the doctrine, but rather should be assessed in light of *discrete analysis* of the particular default in question .... *McGee* v. *United States,* 402 U.S. 479, 485 (1971) (emphasis supplied).

The Court of Appeals mistakenly believed that there exist merely a few specific exceptions to the rule against review prior to exhaustion of all administra-

tive remedies and that petitioner needed, but failed, to bring itself within one of these enumerated exceptions. Thus, having observed that "Seven-Up clearly has not brought itself within any of these exceptions to the rule against judicial review of interlocutory agency rulings" (App. 4a) the Court of Appeals looked no farther to determine the appropriateness of judicial intervention. Instead, the court should have assessed the controlling underlying factors, viz. whether the seriousness of the defects in the FTC proceeding mandated judicial intervention, whether this was an issue which it could have resolved without excessive disruption of the administrative process, and whether in the absence of judicial intervention at this stage there will later be available other adequate relief. *Amos Treat & Co.* v. *Securities & Exchange Commission,* 306 F. 2d 260 (D.C. Cir. 1962); *Jewel Companies, Inc.* v. *FTC,* 432 F. 2d 1155 (7th Cir. 1970).

In contrast to the Eighth Circuit's rigid approach is the pragmatic analysis reflected in the dissenting opinion of Judge Medina in *PepsiCo, Inc.* v. *Federal Trade Commission,* 472 F.2d 179, (2d Cir. 1973) (dissenting opinion), *pet. for cert.* filed April 19, 1973. Judge Medina outlined a variety of reasons why "[i]t is not in the interest of justice that determination of these questions be postponed until the entire proceeding is concluded, especially as these questions are ripe for decision now." *Id.* at 193. In summary, these reasons which are equally pertinent in the instant case, are as follows: (1) the ruling of the Commission is final; (2) valuable property and contract rights of the bottlers are involved; (3) the bottlers' rights to intervention are inadequate and illusory; (4) it is unreasonable to accept the risk that the entire proceeding

will ultimately need to be repeated when this risk can be avoided by making the bottlers parties; (5) failure to join the bottlers in the hearing raises constitutional issues.

In concluding that the district court should not exercise jurisdiction, the Court of Appeals below did not even consider the principal reason for judicial intervention at this stage. Immediate judicial intervention is required to remedy a defect which would otherwise fundamentally taint the FTC proceedings, for failure to join indispensable parties inflicts upon the proceedings a fundamental defect of constitutional proportions. *Shields* v. *Barrow,* 58 U.S. (17 How.) 130 (1854); *Gregory* v. *Stetson,* 133 U.S. 579 (1890); *Western Union Tel. Co.* v. *Pennsylvania,* 368 U.S. 71 (1961). This doctrine, now embodied in Rule 19 of the Federal Rules of Civil Procedure, "is still valid today." *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 124 (1968).[5]

The underlying rationale of the doctrine was explained long ago in *Gregory* v. *Stetson:*

> The rule as to who shall be made parties to a suit in equity is thus stated in Story's Eq. Pl., sec. 72: "It is a general rule in equity . . . *that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may*

[5] In the analogous context of requests for intervention, courts have exercised jurisdiction to determine whether administrative proceedings should be allowed to continue without the absent parties. Railroad Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519 (1947); Interstate Broadcasting Co. v. United States, 286 F.2d 539 (D.C. Cir. 1960); American Communications Association v. United States, 298 F.2d 648 (2d Cir. 1962).

> *be a complete decree, which shall bind them all. By this means, the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it or to others, who are interested in the subject matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits.* When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto." See also 1 Daniell's Ch. Pl. and Pr. 246 *et seq.* (Emphasis added.) 133 U.S. at 586.

The indispensable party doctrine is a basic public policy, which should not be lightly cast aside. This doctrine has long been applied in antitrust cases and is perfectly consistent with antitrust objectives. See *United States* v. *Standard Oil Co. of New Jersey,* 152 Fed. 290 (E.D. Mo. 1907), *aff'd* 221 U.S. 1 (1911); *Fruit Growers' Express Inc.* v. *FTC,* 274 Fed. 205 (7th Cir. 1921), dismissed by stipulation on motion of Solicitor General, 261 U.S. 629 (1923); *Sinclair Refining Co.* v. *FTC,* 276 Fed. 686 (7th Cir. 1921), *aff'd* 261 U.S. 463 (1923); *United States* v. *Northern Pac. R. Co.,* 134 Fed. 715 (8th Cir. 1905); *United States* v. *Hearst Corporation,* — F.Supp. — (S.D. N.Y. 1972).[6]

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[6] In most of the antitrust cases in which absent parties were held not to be indispensable parties, the restrictions under challenge were solely for the benefit of defendants, not the absent parties. National Licorice Co. v. NLRB, 309 U.S. 350 (1940); United States v. United Shoe Machinery Co., 258 U.S. 451 (1922); Automatic Canteen Co. v. FTC, 194 F.2d 433 (7th Cir. 1952), rev'd in part, 346 U.S. 61 (1953). In other cases, the absent party was not required because the defendant was the creature of, or under the control of, absent parties. E.g., Gray Line, Inc. v.

The FTC's position that the indispensable party doctrine must give way to the needs of antitrust enforcement is unfounded and mistakenly assumes incompatibility between these two public policies. The FTC has never shown why the bottlers cannot be joined in this proceeding, and indeed the Commission has recently joined several hundred members of another industry in another action brought by it. *In the Matter of the Society of the Plastics Industry, Inc.*, announced May 30, 1973. Obviously, if the FTC can prosecute a complaint against a class of plastics manufacturers, there is no apparent obstacle to a class suit against the bottlers. Further, the Administrative Law Judge's statement that he would permit the intervention of any bottlers wishing to participate as intervenors demonstrates that joinder of the absent bottlers is feasible. In sum, the Commission's position unnecessarily subverts the indispensable party doctrine, a factor which the Court of Appeals did not adequately consider.

Judicial intervention is also proper because the instant case involves a purely legal issue without any disputed facts. The existence and terms of the franchise agreements are not in dispute. The importance of the territorial provisions to the bottlers and the substantial injury resulting from elimination of the territories are not in dispute. The appropriateness of judicial review in such instances is increased where

Gray Line Sightseeing Companies Assoc., Inc., 246 F.Supp. 495 (N.D. Calif. 1964); United States v. Nationwide Trailer Rental System, Inc., 156 F.Supp. 800 (D. Kan. 1959), aff'd. 355 U.S. 10 (1957). In United States v. National Lead Co., 63 F.Supp. 513 (S.D. N.Y. 1945), aff'd 332 U.S. 319 (1947), the absent parties were foreign members of a world cartel, and a joinder requirement would have defeated the court's jurisdiction.

"[the] question raised is inherently a legal one and does not involve any factual determinations." *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155 (7th Cir. 1970). See also, *McKart* v. *United States*, 395 U.S. 185, 205-6 (1969); *Elmo Division of Drive-X Company* v. *Dixon*, 348 F.2d 342, 347 (D.C. Cir. 1965).

In deciding this case, the District Court would not have substituted itself for the Commission as the fact-finder on the issues in the Commission's complaint against plaintiff. As noted, the issue before the District Court was a purely legal issue, and one wholly distinct from the issues raised by the FTC complaint. This Court observed in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), in upholding the jurisdiction of the District Court to grant injunctive and declaratory relief without exhaustion of administrative remedies:

> [W]e believe the issues presented are appropriate for judicial resolution at this time. First, all parties agree that the issue tendered is a purely legal one: whether the statute was properly construed by the Commissioner. . . . 387 U.S. at 149.

Judicial intervention in the instant case is also appropriate because by any practical standard the Commission's action is final on the joinder issue, as the Court of Appeals acknowledged. (5a) The indispensable party issue was formally presented to, and ruled upon by, the Administrative Law Judge and the Commission. Neither the Administrative Law Judge nor the Commission suggested that further proceedings might cause them to change their holdings. Indeed, the profound impact of the FTC proceedings upon the bottlers has been acknowledged by the Administrative Law Judge. (21a)

As this Court has taught, "The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." *Abbott Laboratories* v. *Gardner, supra,* at 149-50. Thus, "The test of finality for purposes of review is not whether the order is the last administrative order contemplated by the statutory scheme, but rather whether it imposes an obligation or denies a right with consequences sufficient to warrant review." *Environmental Defense Fund, Inc.* v. *Ruckelshaus,* 439 F.2d 584, 589 fn. 8 (D.C. Cir. 1971). In this regard, it is pertinent that

> The "final agency action" made reviewable under § 10(c) of the Administrative Procedure Act need not necessarily be read as synonymous with "a final order of the Board granting or denying in whole or in part the relief sought . . ." made reviewable under § 10(f) of the National Labor Relations Act. " 'Finality' is not . . . a principle inflexibly applied." *Deering Milliken, Inc.* v. *Johnston,* 295 F. 2d 856, 865 (4th Cir. 1961).[7]

Under the foregoing authorities, it is clear that the Commission's ruling in the instant matter constitutes

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[7] The Court of Appeals for the Fourth Circuit pointed out that both committees of the House and Senate included in their reports on the Administrative Procedure Act a statement that final action includes any effective agency action for which there is no other adequate remedy in court.

> It is true that no such definition of "final action" was included in the Act, itself, but the provision of § 10(e) authorizing the courts to compel agency action unreasonably delayed, makes it plain that the word was used in that sense in § 10(c) . . . . When a party suffers a legal wrong from continuing agency delay and, as here, there is no other adequate administrative or judicial remedy, the delay is final agency action for which § 10 of the Administrative Procedure Act does provide an effective remedy. 295 F.2d at 865-866.

final action. As Judge Medina observed in the *Pepsi-Co.* decision: "Every effort to persuade the FTC to join these indispensable parties and thus afford them proper and reasonable notice and an effective hearing has failed." 472 F.2d at 193. In the words of the court in *Environmental Defense Fund,* the Commission's ruling "denies a right with consequences sufficient to warrant review." 439 F.2d at 589, fn. 8.

The only reasons adduced by the FTC for denying joinder of the bottlers are considerations of administrative ease in the handling of this case and in restructuring the soft drink industry. However, if the bottlers' contract rights are destroyed in their absence from this proceeding, petitioner will be faced with the prospect of inconsistent demands and multiple lawsuits by the bottlers. Such conflicts are certain, if the "Metro Area Bottler Handicap" is imposed by the Commission, for that proposal would create two adverse classes of bottlers, some of whose contract rights would be eroded for the benefit of the others. The only beneficiary of such an approach will be the Commission, which will sit on the sidelines while the bottlers, petitioners, and the courts try to sort out the changed contractual relationships in the course of many lawsuits. To attempt to impose on petitioner an Order abrogating and altering contractual rights without any assurance that it will not be subjected to multiple litigation by bottlers not parties to this proceeding denies it due process. *Western Union Tel. Co.* v. *Pennsylvania, supra,* at 75.

The government has contended that, even if the bottlers are indispensable parties and should be joined in the FTC proceeding, petitioners will suffer only

the burden of a duplicative proceeding. On the contrary, failure to join indispensable parties at this stage inflicts irreparable injury because, after protracted Commission proceedings, the indispensable party issue will be subjected to a different and more stringent standard of review.[8] As this Court pointed out in *Provident Tradesmens Bank and Trust Co.* v. *Patterson,* 390 U.S. 102 (1968), one of the criteria for determining the indispensable character of a party is

> . . . the importance, if any, of the fact that a judgment, binding on the parties although not binding on [the non-party], had already been reached *after extensive litigation*[.] *Id.* at 109. (emphasis supplied.)

Likewise, in *Jewel Companies, Inc.* v. *FTC,* 432 F.2d 1155 (7th Cir. 1970), which raised the question of whether one of the Commissioners had misconstrued his statutory obligation in authorizing the proceedings, the court upheld the propriety of judicial review before the proceedings were completed because of the more stringent review which would be imposed after trial:

> If the question of the Commissioner's obligation is postponed until final appeal of a Commission order, *the standard of review will be different.* At that point the court of appeals would only decide whether the final order is supported by the evidence and would not question the authority of the Commission in issuing the complaint. As in *Skinner & Eddy,* "the so-called administrative remedy was without relevance to the plaintiff's claim." 432 F.2d at 1159 (emphasis supplied).

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[8] The Court of Appeals rejected this contention in a bare footnote comment without citation or other support. (5a)

CONCLUSION

The Federal Trade Commission's action in denying petitioner's request for joinder of the bottlers or dismissal of the complaint unnecessarily and arbitrarily disregards the well-established doctrine of indispensable parties. The Commission took this action in the knowledge of the serious disruption to the soft drink industry that will attend these proceedings. The instant action, then, presented the federal courts with an issue clearly warranting and requiring prompt judicial remedy. Nonetheless, the courts below held erroneously that the federal courts are powerless to intervene in such a situation.

Wherefore, the petition should be granted.

Respectfully submitted,

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